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### Sex Stories: A Review of Sex and Reason

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## Book Review

SEX STORIES—A REVIEW OF  
SEX AND REASON by Richard A. Posner.\* Cambridge, Mass.: Harvard  
University Press 1992. Pp. 442.

Margaret Chon\*\*

In the major western narrative for generating self and other, one is  
always too few and two are always too many.<sup>1</sup>

### *Introduction*

Richard Posner's choices—of epigraph,<sup>2</sup> and at-first-glance ironic  
but ultimately sincerely offered title—tell us an enormous amount  
about Posner's preferred stories. They are stories that constantly set

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\*\* Assistant Professor of Law, Syracuse University College of Law. A.B. 1979, Cornell University; M.H.S.A. 1981, J.D. 1986, The University of Michigan. This review essay grew out of a paper, "Reasons for Reasoning About Sex," for the Seventh Annual Round Table on Law and Semiotics, sponsored by the Center for Semiotics Research in Law, Government and Economics at Pennsylvania State University. Thanks to all the bright lights at the Round Table, but particularly to Denis J. Brion, Roberta Kevelson, and Robin Paul Malloy. Thanks also to my colleague Donna E. Arzt for providing me with interesting comments and secondary source material, as well as to my research assistants, Alana N. Grice and Stewart A. Pollock, who traipsed tirelessly over to Bird, Moon, and Sci/Tech. This is for autumn and spring: my mother, Keum Sook Choo, and my daughter, Chloe Chon Diamond.

1. DONNA J. HARAWAY, PRIMATE VISIONS: GENDER, RACE, AND NATURE IN THE WORLD OF MODERN SCIENCE 352 (1989).

2. "Pleasures are an impediment to rational deliberation, and the more so the more pleasurable they are, such as the pleasures of sex—it is impossible to think about anything while absorbed in them." RICHARD A. POSNER, SEX AND REASON 1 (1992) (quoting ARISTOTLE, NICOMACHEAN ETHICS [bk. VII, § XI]).

up dichotomies: the "sex" pole, for example, opposing the "reason" pole. But Posner has what he thinks are subversive intentions in establishing the overarching dualism in this book. He disputes Aristotle's assertion that "Sex and Reason" are insuperably opposite, mutually exclusive, fundamentally antagonistic categories. Sex, like most things, can be explained satisfactorily through reason. Reason slices through the mystery of sex, ridding it of the unnecessary messiness of superstition, irrationality, ambiguity.

To explore sex through reason is, through an act of Western will, to impose order on chthonic disarray. The ensuing domestication of sex will help to create ever more dazzling structures of efficient social order. This order will in turn liberate us to be wealthier, more productive, more fulfilled, better human beings. Posner has a pragmatic goal—to engage in law and economics in order to generate testable hypotheses for the fine-tuning of laws, the consequences of which are judged "by their conformity to social or other human needs."<sup>3</sup> Thus he claims that he wants simply to help increase the sum of human happiness.

But, significantly, the relationship that he posits is that of conquest. Although reason powerfully explains sex, sex does not have much to say about reason. The stories that Posner tells are those of an unremittingly unself-conscious utopian rationalist, squarely within the Enlightenment-as-faith tradition of American social planners. They are inscribed with the Western need to define a "self"—an individual rational self—through the act of setting up the "other." These opposite poles are not simply opposites; they are fundamental to the structuring of knowledge within both the human and natural sciences. One pole of each dualism requires the other; one pole of each dualism dominates the other. Posner continually asserts that reason—specifically, bioeconomic theory—predicts sexual behavior. Thus he does not subvert the dualism of sex and reason (which is what he thinks he is doing) so much as reinforce it. What remains unexamined in his stories are the reasons for privileging reason over sex.

Posner introduces a new scientific tool in this book: bioeconomics. He marries the social scientific methods of law and economics to the evolutionary theory of the biological sciences. The consummation of the science of economics with the science of biology produces an offspring that is a superexplanatory paradigm, even more powerful than

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3. Richard A. Posner, *What Has Pragmatism to Offer Law?*, in PRAGMATISM IN LAW & SOCIETY 29, 35 (Michael Brint & William Weaver eds., 1991) [hereinafter Posner, *Pragmatism*]; see also RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 464 (1990) [hereinafter POSNER, *JURISPRUDENCE*] (claiming that pragmatism "shifts the emphasis in the philosophy of science from the discovery of nature's laws by observation to the formulation of theories about nature (including man and society) on the basis of man's desire to predict and control his environment, both social and natural").

each of its parents, perhaps bionic.<sup>4</sup> His decision to invoke the discourse and methods of sociobiology signals his commitment to a rigorous standard of reason as a basis for recommending legal programs.

Others have explored the inability of Posner's bioeconomic theory to account for certain phenomena,<sup>5</sup> his frequent eliding of the normative with the descriptive,<sup>6</sup> as well as the absence of a moral center to his work that would enable him to accomplish the good things he claims he wants to accomplish.<sup>7</sup> I want instead to explore the implications of his exuberant faith in bioeconomic reasoning, unalloyed by any of the late modernist or postmodernist challenges to the nature and limits of science and its transformative potential. In doing so, I attempt three things. First, I discuss some of his sociobiological assertions in order to demonstrate that evolutionary biology consists of a much richer and more contradictory set of assertions than Posner would have us believe. Even within the empiricist framework, therefore, Posner leaves out many stories that could produce a less biased picture of human sexual behavior. Second, I examine these sociobiological "facts" about sex for what they tell us about reason. The stories that Posner tells about human sexual behavior fit into a typology of

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4. POSNER, *supra* note 2, at 88 ("[T]he two approaches are mutually reinforcing and may in combination constitute a more powerful theory than either by itself.").

5. Denis Brion explores the failure of Judge Posner's bioeconomic theory to explain satisfactorily the jury's decision in the civil fraud trial of *Askew v. Askew*. Denis J. Brion, Richard Posner's "Sex and Reason": Meaning and the Ghost in the Machine (June 29, 1993) (unpublished manuscript, on file with the author) (reviewing RICHARD A. POSNER, SEX AND REASON (1992)). Elsewhere, Martha Nussbaum has analyzed its lack of explanatory power with respect to five excerpts from widely read literary classics. See Martha Nussbaum, "Only Grey Matter"? Richard Posner's Cost-Benefit Analysis of Sex, 59 U. CHI. L. REV. 1689 (1992) (reviewing RICHARD A. POSNER, SEX AND REASON (1992)). Feminist economist Gillian Hadfield faults Posner's theory for, among other things, failing to recognize that sexual practices determine women's economic status just as much as the other way around. See Gillian K. Hadfield, *Flirting with Science: Richard Posner on the Bioeconomics of Sexual Man*, 106 HARV. L. REV. 479, 494-99 (1992) (reviewing RICHARD A. POSNER, SEX AND REASON (1992)). Martin Zelder cautiously admires this "significantly flawed initial attempt." Martin Zelder, *Incompletely Reasoned Sex: A Review of Posner's Somewhat Misleading Guide to the Economic Analysis of Sex and Family Law*, 91 MICH. L. REV. 1584, 1586 (1993) (reviewing RICHARD A. POSNER, SEX AND REASON (1992)). Each of these works points out ways in which Judge Posner's theory falls short of explaining certain phenomena. By the norms of scientific method itself, which include the evaluation of any proposed theory partly by its descriptive and explanatory power of subjects within its purview, the consensus so far is that bioeconomic theory falls short of the claims that Posner makes about it—namely, that it is "[t]he most promising theory of the subject that we are likely to have for some time." POSNER, *supra* note 2, at 8.

6. See Katharine T. Bartlett, *Rumpelstiltskin*, 25 CONN. L. REV. 473 (1993) (reviewing RICHARD A. POSNER, SEX AND REASON (1992)); Martha A. Fineman, *The Hermeneutics of Reason: A Commentary on Sex and Reason*, 25 CONN. L. REV. 503 (1993) (reviewing RICHARD A. POSNER, SEX AND REASON (1992)); Ruthann Robson, *Posner's Lesbians: Neither Sexy nor Reasonable*, 25 CONN. L. REV. 491 (1993) (reviewing RICHARD A. POSNER, SEX AND REASON (1992)); see also Martha Ertman, *Denying the Secret of Joy: A Critique of Posner's Theory of Sexuality*, 45 STAN. L. REV. 1485 (1993) (reviewing RICHARD A. POSNER, SEX AND REASON (1992)); William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333 (1992) (reviewing RICHARD A. POSNER, SEX AND REASON (1992)).

7. See Robert P. George, *Can Sex Be Reasonable?*, 93 COLUM. L. REV. 783, 783 (1993) (reviewing RICHARD A. POSNER, SEX AND REASON (1992)); Robin West, *Sex, Reason, and a Taste for the Absurd*, 81 GEO. L.J. 2413, 2416 (1993) (reviewing RICHARD A. POSNER, SEX AND REASON (1992)).

scientific narrative—one that depends upon the elucidation of an irreducible core of scientific “fact.” Human sociobiology, however, is a field so free of fact constraints that a sociobiological “fact” tells us more about the scientist’s standpoint than it does about the human social behavior that person is purporting to describe.<sup>8</sup> Posner’s reliance upon sociobiology to distance himself from constructivist accounts of human sexuality is, therefore, misplaced. Finally, I analyze how Posner’s scientific method defines and delimits the concept of “objectivity” in an unnecessarily constricting fashion. Although he employs the methods of a comparativist (comparing different cultures, different historical epochs, and even different disciplines), he is tied to a view of objectivity that fundamentally denies the possibility of a comparative perspective. His standpoint is that of a putatively detached, uninterested, scientific observer—a standpoint that disables him from appreciating, much less acknowledging, the different perspectives possible even within his native discipline of law and economics. This is glaringly evident, for example, in his responses to various review essays already published.<sup>9</sup>

Throughout these various tasks, I am specifically interested in showing the power of modernist thought to subvert itself through the application of reason to reason itself. Judge Posner’s stories casually rely on the self-evident superiority of a particular form of scientific knowledge to other forms of knowledge in accounting for material phenomena, resting ironically on a scientific discipline—human sociobiology—that itself is suspect science.<sup>10</sup> Examining his methods exposes his foundational assumptions. Although scientific narratives are not inherently conservative, the particulars of Posner’s narrative severely limit the possibilities of human change. More important, however, they deny the relevance and even the existence of any other stories, scientific or not. Posner’s insistence that his brand of “reason” is superior to any other form raises the interesting question of why it is that an intelligent, rational, skeptical, secular humanist is unable to critique the logic or appreciate the limitations of his own rather enormous assumptions.

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8. Cf. STEPHEN J. GOULD, *The Nonscience of Human Nature*, in *EVER SINCE DARWIN: REFLECTIONS IN NATURAL HISTORY* 237, 239 (1977) (“The Church eventually made its peace with Galileo because, after all, the earth does go around the sun. In studying the genetic components of such complex human traits as intelligence and aggressiveness . . . we are freed from the constraint of fact, for we know practically nothing. In these questions, “science” follows (and exposes) the social and political influences acting upon it.”).

9. Richard A. Posner, *The Radical Feminist Critique of Sex and Reason*, 25 *CONN. L. REV.* 515 (1993). This response is discussed further *infra* text accompanying notes 65-73.

10. See PHILIP KITCHER, *VAULTING AMBITION: SOCIOBIOLOGY AND THE QUEST FOR HUMAN NATURE* 125 (1985) (describing as “pop sociobiology” that aspect of sociobiology that purports to explain the behavior of *Homo sapiens*).

## I. Bioeconomics After the Honeymoon

For those who are not trained as biologists, Carl Degler offers this explanation of how sociobiology approaches the question of sexual behavior:

Insofar as sex differences are concerned, the most relevant sociobiological principle is called *differential reproductive strategies*. Simply put, it states that males and females, especially among mammals, have different approaches to reproduction because of the nature of sexual reproduction. For females the cost of reproduction is high, entailing a high investment of energy in the form of large eggs and, most important, long periods of gestation and lactation. For males, reproduction is quick, cheap, and easy. The distinction is the basis of Darwin's principle of sexual selection.<sup>11</sup>

Posner uses this difference as the primary explanatory principle of human sexual behavior. Men have different sexual strategies from women, that is, different strategies for optimizing the appearance of their genes in the next generation's gene pool. Posner then claims that the cultural differences in sexual behavior can be attributed to just a few additional variables, most important of which is "the changing occupational role of women."<sup>12</sup> He is an unapologetic determinist—for him, both biology and economics posit a view of human behavior driven by ends that are largely predetermined, although economics is slightly more constructivist than biology is and represents the cultural variation among biologically similar human beings.<sup>13</sup> In the case of biology, that end is the maximization of one's (or one's family's) genes in the gene pool; in the case of economics, that end is the maximization of benefits and minimization of costs to a rational individual. "Both analyze rational behavior in the sense of the fitting of means to ends . . . ."<sup>14</sup>

Judge Posner marries evolutionary to economic theory by this analogy, somewhat like marrying two people because they both have the same phenotype of brown hair. Both theories presume that behavior is driven toward a single "end"; this similarity in theoretical structure in turn creates a way of evaluating sex that is privileged not only because man and woman are driven by reasoned interest (via Posner's typical neoclassical economic assumptions of the *self*-maximizing individual) but also because they are driven by their genes (via a biologist's assumption of a *sex*-maximizing individual, particularly a male individual).<sup>15</sup> To use terminology that Judge Posner employs in his analysis of marriage, marrying evolution to economics results in a "companionate marriage"—a "marriage between at least approximate equals, based on mutual respect and affection, and involving close and continuous association in child rearing, household management,

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11. Carl N. Degler, *Darwinians Confront Gender; or, There Is More to It than History*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE 33, 38-39 (Deborah L. Rhode ed., 1990).

12. POSNER, *supra* note 2, at 86.

13. *See id.* at 88.

14. *Id.* at 108.

15. I use the modifier "male" deliberately because, according to Posner, men constantly seek sex whereas women are "charier." *Id.* at 91.

and other activities, rather than merely the occasional copulation that was the principal contact between spouses in the typical [ancient] Greek marriage."<sup>16</sup> The sciences of economics and biology both want the same thing—explanatory offspring through affectionate contact.

This marriage illustrates in a macro sense exactly what is wrong with Posner's use of biology in this book in a micro sense. He presumes too much from a premise—in this case, the premise of similarity. From the similarity between economic determinism<sup>17</sup> and what he portrays as biological determinism, he infers a basic affinity between the two scientific disciplines, a sharing of assumptions and goals, a fungibility of disciplinary labels: The individual becomes the gene; neoclassical economics becomes Darwinism. Putting aside for the moment the marriage metaphor, he makes the common mistake made by biologists of confusing analogy (outwardly similar traits) with homology (traits shared by virtue of common heredity).<sup>18</sup> If this were a real marriage between two human beings, I would predict at least an even chance of antipathy, separation, or divorce within a year. Outward physical similarity and even shared heredity (the Enlightenment tradition of privileging reason) do not necessarily determine inner compatibility; two brown-haired people are not destined to become partners for life.

Sociobiology aside, biological science has the very distinct purpose of attempting to provide explanations of natural, organic phenomena. It is not the primary purpose of biology to provide descriptions, explanations, or—significantly—prescriptions or justifications for human social practices. Even the leading proponent of sociobiology, Edward O. Wilson, cautions that sociobiology is mostly about animals other than humans<sup>19</sup> and that his work is not to be read "uncritically as a tested product of science."<sup>20</sup> Economics, by contrast, is all about human social behavior, and law, of course, is all about human norms. The tension and incompatibility between the natural sciences and the social sciences, which Judge Posner fails to acknowledge in his use of bioeconomics, is one source of insight into his various methodological biases. Social science, as I will discuss below, is deeply implicated within human social practices in a way that biological science simply cannot be.

16. *Id.* at 45.

17. Others within the field of law and economics are far less convinced that economics is driven solely by efficiency and wealth-maximization. See, e.g., Robin P. Malloy, *Is Law and Economics Moral?—Humanistic Economics and a Classical Liberal Critique of Posner's Economic Analysis*, 24 VAL. U. L. REV. 147 (1990).

18. See GOULD, *supra* note 8, at 240-41.

19. See Edward O. Wilson, *Sociobiology: From Darwin to the Present*, in DARWIN'S LEGACY: NOBEL CONFERENCE XVIII at 53 (Charles L. Hamrum ed., 1st ed. 1983).

20. EDWARD O. WILSON, ON HUMAN NATURE at x (1978); see also KITCHER, *supra* note 10, at 133-81 (describing the difference between sociobiological studies of insect societies and "pop sociobiology" of human societies).

Judge Posner repeatedly commits the same basic mistake in his bioeconomic analysis of sex—that is, presuming too much from the “facts” about sex. Just as he errs in inferring scientific kinship from mere resemblance in characteristics, he similarly errs in confounding correlation with causality. Two examples should suffice. Early on, he contends:

[T]he male’s promiscuity reduces the danger of incest. The male is not content with one sexual partner, who may happen to be a close relative; and the more sexual partners he has, the less likely are all or most of them to be his close relatives, since a person has only a limited number of close relatives.<sup>21</sup>

Assuming for the purposes of evolutionary theory that optimal male sexual strategies can include promiscuity, this assertion claims far too much. It is true that if a man impregnates women outside his immediate family, the quality, not just the quantity, of the gene pool will increase. The biological explanation for this is that incest is likely to lead to the pairing of recessive genes that carry harmful characteristics, and thus is more likely to lead to less fit individuals. But how does Judge Posner conclude that male promiscuity reduces the likelihood of incest? One could assert just as easily (perhaps even more easily) that male promiscuity is biologically maladaptive because it *increases* the likelihood of incest by having a male turn from an unrelated companion to kin. The ease with which this assertion can be turned on its head raises a suspicion of a biological apologia for the good old double standard: Male promiscuity is a biologically adaptive response to incest, a biologically maladaptive act.<sup>22</sup>

Another assertion that Posner makes repeatedly is that, “[i]n the economic analysis of sex, women surrender their sexual freedom to men not (or not only) out of altruism or biological predisposition, but in exchange for protection from men.”<sup>23</sup> This assertion underpins his detailed economic analysis of the effect of the American and Swedish welfare policies in discouraging companionate relationships. These programs, as well as the increase in job opportunities for women, have led to “a change in the female sexual strategy. No longer is the male offer of protection as valuable to the female, so women are less willing to provide the commodity used to purchase that protection—female chastity.”<sup>24</sup> Assuming for the purposes of evolutionary theory that optimal female sexual strategies can include ensuring that a man who impregnates her will stick around and take care of her (a distinctively mammalian need because of the relatively long period of gestation and lactation compared to other species), why does this compel a *quid*

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21. POSNER, *supra* note 2, at 94-95. This, like many of his other categorical assertions, bears no citation to the scientific literature.

22. Moreover, Posner’s subsequent bioeconomic analysis of incest taboos seems to indicate that they are not necessarily supportable on evolutionary grounds. *See id.* at 199-201. If so, then his bioeconomic account of male promiscuity is incoherent to the extent that it asserts the goal (whether descriptive or prescriptive) of avoiding incest through promiscuity.

23. *Id.* at 168. Again, Posner does not provide a specific citation for this proposition.

24. *Id.* at 171.



*pro quo* arrangement of sexual sequestration in exchange for protection? As biologists have observed, "among chimpanzees, our closest relatives, the females turn out to be highly promiscuous."<sup>25</sup> Anthropologist Adrienne Zihlman's interpretation of chimpanzee behavior posits early human groups as matrilineal, mobile societies characterized by impermanent male-female pair bonds, which were not dependent on a sharp sexual division of labor.<sup>26</sup> Female promiscuity therefore cannot be rejected out of hand as inconsistent with the goals of the gene to maximize its appearance in succeeding generations.

The prevailing sociobiological accounts of this sexual pact (male protection in return for female monogamy) rely heavily on the notion that a tribe of human beings can only be united through a common identifiable male ancestor.<sup>27</sup> But even as a matter of pure logic, this cannot be the case. A common female ancestor certainly is more readily identifiable than a male ancestor, because progeny issue from her body, and thus matrilineal ancestral claims are practically uncontroversial. Thus, a common female ancestor could be just as strong a tribal icon as a male ancestor. Moreover, polygyny is not necessarily inconsistent with male care of the young. Sociobiologist Sarah Blaffer Hrdy, for example, describes various studies of "male baboons and macaques which, in spite of female promiscuity (or more precisely, matings with multiple but selected partners), were protecting and carrying about selected infants, many of whom but not all were probably their own."<sup>28</sup>

Both of these examples of Posner's sociobiological reasoning illustrate the tendency of sociobiological explanations of human behavior to prove too much, thus nullifying their persuasiveness. Moreover, these examples show that the large zone of explanatory discretion characteristic of bioeconomic accounts tends to be used to justify certain existing sexual practices, but not to justify equally legitimate opposite inferences that are not apparent in dominant social patterns.

The inferences that are typically left out in sociobiological accounts of human behavior are ones that relate to the sexual practices of a minority of human beings (such as lesbians) or those of a politically or

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25. John Dupré, *Global Versus Local Perspectives on Sexual Difference*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE, *supra* note 11, at 47, 51.

26. See HARAWAY, *supra* note 1, at 337.

27. See WILSON, *supra* note 20, at 126.

28. Sarah B. Hrdy, *Introduction to FEMALE PRIMATES: STUDIES BY WOMEN PRIMATOLOGISTS* 103, 105 (Meredith F. Small ed., 1984). Donna Haraway details how Hrdy's preferred sociobiological stories rely on "[c]ompetition among assertive, dominance-oriented females . . . , built into their natural status as limiting resources whose eating habits are the pivot of sexual politics. . . . Females remain committed to reproduction, but not within a maternalist discourse. Rather, females are redeployed semiotically within a strategic investment discourse . . . ." HARAWAY, *supra* note 1, at 365.

physically less powerful majority (such as women) or those of politically powerless minorities (lesbian women). Posner is not troubled much by this because he believes that the dominant social practices reflect "durable adaptations to deep, though not necessarily innate or genetic, human capacities, drives, needs, and interests."<sup>29</sup> But his lack of speculation over what *isn't* reveals a fatal reductionism. Despite his claims to neutrality and objectivity, Posner collapses the biological "fact" (male reproductive strategies, which are consistent with promiscuity) into the social "fact" (near-universal incest taboos), in a highly simplistic and logically questionable fashion. He also collapses the biological "fact" (long human female lactation periods) into prevailing social norms (female chastity), although he claims to be motivated strictly by rational and not moral concerns.

The observation that a different scientist could take the same "facts" and construct a different theoretical explanation for them is hardly startling.<sup>30</sup> But another problem with Judge Posner's facts stems from the distinct logical weaknesses of sociobiology as a subset of evolutionary biology. There are many questionable links in the inferential chain, beginning with the difficulty in describing the relevant behavior that leads to evolutionary change.<sup>31</sup> By focusing on one set of behavioral facts to the exclusion of others, the scientist risks proposing an explanatory theory that has little, if anything at all, to do with the processes of evolution.

In Posner's sociobiological descriptions of human sexual behavior, for example, he relies on male competition rather than female choice as the significant behavior from an evolutionary standpoint. As explained succinctly by biologist Stephen Jay Gould:

Darwin delineated two modes of sexual selection, called "male competition" and "female choice." In male competition—e.g., among antlered deer—males fight like hell and the winners get the females. In female choice males strut and preen, display and bellow, and females choose to mate with the individuals that impress them most. Peacocks, in other words, do not evolve their showy tails for direct victory in battle over other males, but to win a beauty contest run by females.<sup>32</sup>

Posner puts men in the driver's seat of evolution (much as some feminist legal scholars theorizing about sex from a purely constructivist stance do with respect to power relations between men and women). But if one decides to focus on female animal behavior—particularly in other primates—one may find that the sexual selection

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29. POSNER, *supra* note 2, at 30.

30. Scientific method in any discipline does not necessarily yield a single theory from a set of facts; a recent example in the area of evolutionary biology is biologist Margie Profet's proposed theory of menstruation as "a mechanism for protecting a female's uterus and Fallopian tubes against harmful microbes delivered by incoming sperm," rather than a passive loss of unused uterine lining. Natalie Angier, *Radical New View of Role of Menstruation*, N.Y. TIMES, Sept. 21, 1993, at C1.

31. See KITCHER, *supra* note 10, at 123.

32. Stephen J. Gould, *The Confusion Over Evolution*, N.Y. REV. BOOKS, Nov. 19, 1992, at 47, 50 (reviewing HELENA CRONIN, *THE ANT AND THE PEACOCK: ALTRUISM AND SEXUAL SELECTION FROM DARWIN TO TODAY* (1992)).

process may be explained just as adequately through a female choice model.<sup>33</sup> Whatever construct is more descriptive of human sexual behavior, it is nonetheless revealing that Posner chooses not to discuss women as active decisionmakers until the transition from what he calls stage two to stage three (from women who function primarily as childrears in companionate marriages to women who participate in the wage labor market). An imprimatur of male competition throughout thousands of years of biological evolution and cultural development is thus stamped on Posner's bioeconomic history of sexuality. But this is only one possible story of human evolution, even within the parameters of biology itself.<sup>34</sup> And outside the parameters of sociobiology, others have documented the historical contingency of the male competition model.<sup>35</sup>

Two other points about Posner's sociobiological stories are important to consider. First, he is enamored of the "selfish gene" school of evolutionary theory—one that is controversial within biological science itself. He unequivocally adopts the view espoused by Richard Dawkins that the functional unit of evolutionary change is the gene.<sup>36</sup> Again Gould points out alternative views such as "a model that views selection as operating simultaneously at several levels of a genealogical hierarchy including genes, organisms, local populations, and species. In other words, . . . no natural entity can properly be described as the exclusive 'unit of selection.'"<sup>37</sup> Posner fails to acknowledge that

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33. See, e.g., HARAWAY, *supra* note 1, at 338. According to Professor Haraway:

In the late 1960s . . . , Zihlman studied Hugo van Lawick's Gombe chimpanzee film workprints . . . . Randall Morgen offered to show Zihlman "X-rated" footage that would never find its way into a National Geographic television special. Zihlman recalled being struck by the suggestions of female sexual choice in the explicit, close up sequences.

*Id.* This, among other influences on Zihlman's work, according to Haraway, infuses it with the female choice perspective. *Id.*

34. Kitcher describes in detail many of the other logical flaws in what he terms "Wilson's ladder." See KITCHER, *supra* note 10, at 133-280.

35. See THOMAS LAQUEUR, MAKING SEX: BODY AND GENDER FROM THE GREEKS TO FREUD 3-4 (1990) ("The commonplace of much contemporary psychology—that men want sex while women want relationships—is the precise inversion of pre-Enlightenment notions that, extending back to antiquity, equated friendship with men and fleshliness with women.").

36. See RICHARD DAWKINS, THE SELFISH GENE (1976).

37. Gould, *supra* note 32, at 47; see also Stephen J. Gould, *Caring Groups and Selfish Genes*, in CONCEPTUAL ISSUES IN EVOLUTIONARY BIOLOGY: AN ANTHOLOGY 119, 119-20 (Elliott Sober ed., 1984) ("[C]hallenges to Darwin's focus on individuals have sparked some lively debates among evolutionists. These challenges have come from above and below. From above, Scottish biologist V.C. Wynne-Edwards raised orthodox hackles . . . by arguing that groups, not individuals, are units of selection, at least for the evolution of social behavior. From below, English biologist Richard Dawkins has recently raised my hackles with his claim that genes themselves are units of selection, and individuals merely their temporary receptacles.").

his choice of the gene as the unit of selection is one among competing paradigms. By presenting evolutionary biology as a cardboard cut-out instead of as the complex set of competing claims that it really is, he does a great disservice to the science of biology even within the empiricist framework under which he self-consciously operates. I find this particularly problematic given his likely audience: non-biologists who went to law school because they could not stand the sight of blood. In addition, the focus on the gene to the utter exclusion of community-based units of selection means that he never gets around to discussing the biological basis of altruism—an omission that is consistent with his neoclassical economic emphasis on the self-maximizing individual.<sup>38</sup> All of these uncritical, caricaturizing, and even clumsy uses of biological science by an educated rational skeptic provide clues that Posner's bioeconomic "facts" are composed at least in part of unexamined beliefs and assumptions.

Second, Posner's discussion of the biological basis of homosexuality omits any sustained discussion of its superiority to alternative theories in providing a normative basis for social policy. In his discussion of why a gene for (male) homosexuality may have survived despite natural selection in favor of aggressive heterosexual males, for example, he states:

For some men, the optimal strategy for spreading their genes may be to protect the offspring of their close relatives—with whom they share many of the same genes, so that the protecting relative is indirectly propagating his own genes by increasing the likelihood of the relative's surviving to reproductive age . . . .<sup>39</sup>

In Posner's analysis, the selfish gene might explain the persistence of male homosexuality—a kind of outwardly altruistic behavior that enhances the probability of one's genes appearing in the next generation by freeing the homosexual male to care for his nieces or nephews. This claim is a clear echo of Wilson's view that male homosexuality is explainable by the "kin-selection hypothesis."<sup>40</sup> But Posner's bioeconomic treatment of male homosexuality points to the ultimate conundrum posed by bioeconomic theory as a basis for constructing social programs. Even if it is true that homosexual behavior is genetically based to some degree,<sup>41</sup> the question is why should that

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38. Kitcher discusses the tautological quality of Dawkins's and Wilson's claims that all altruistic behavior is fundamentally selfish. See KITCHER, *supra* note 10, at 396-406.

39. POSNER, *supra* note 2, at 101.

40. WILSON, *supra* note 20, at 145. Wilson also wrote: "I wish to suggest . . . that homosexuality is normal in a biological sense, that it is a distinctive beneficent behavior that evolved as an important element of early human social organization. Homosexuals may be the genetic carriers of some of mankind's rare altruistic impulses." *Id.* at 143. Gould, on the other hand, claims that the altruism that is relevant from a sociobiological perspective is altruism towards people other than our close relatives, which forms the largest domain of altruistic behavior. See Gould, *supra* note 32, at 52.

Wilson and Posner's formulation, although plausible with respect to homosexual "altruism," does not explain the larger altruism on which human societies depend as much for their existence as they do on the so-called "selfish gene."

41. In addition to the kinship-selection theory, recent discovery of an area of the female X chromosome that is more frequently found in male homosexuals tentatively supports this conclusion. Dean H. Hamer et al., *A Linkage Between DNA Markers on the X*

"fact" be superior to an alternative "fact" of non-genetically based homosexuality as a basis upon which to construct social policy? Genes and natural selection may help explain certain human behavior—then again, they may not—but human behavior persists in any case, whatever its origin. Is it really necessary to invoke the god of bioeconomic rationality in order to accommodate whatever human sexual practice is at issue? For all his previous thoughts on jurisprudence,<sup>42</sup> Posner does not propose a cogent reason for his automatic reliance on arguments of innate genetic traits as a preferred basis for legal decisionmaking.

Perhaps the *Bowers v. Hardwick* decision<sup>43</sup> tells us that an effective sociopolitical strategy for homosexuals would be to emphasize the possibly biologically adaptive basis of homosexuality in order to counter deeply held prejudices, within the judiciary and elsewhere, against homosexuals. Yet the current controversy within the gay community over recent scientific discoveries of possible physical bases for sexual orientation indicates that gay men and lesbians themselves do not uniformly view biological evidence as an unproblematic political basis for constructing social agendas.<sup>44</sup> Biology might form a firmer basis for an equal protection argument that homosexuality means, among other things, that one is a member of a discrete and insular minority characterized by immutable traits.<sup>45</sup> But the existence of a biological basis for sex and race differences did not prevent and has not eliminated sexism or racism. The mere acknowledgement of biological differences without any proposed methods of bridging across those differences, or a moral argument that differences should not

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*Chromosome and Male Sexual Orientation*, SCIENCE, July 16, 1993, at 321. Twin studies of lesbians also tentatively support a genetic basis for female homosexuality. See, e.g., J. Michael Bailey et al., *Heritable Factors Influence Sexual Orientation in Women*, 50 ARCHIVES GEN. PSYCHIATRY 217 (1993), available in LEXIS, Genmed Library.

42. See generally POSNER, JURISPRUDENCE, *supra* note 3.

43. 478 U.S. 186 (1986).

44. See, e.g., Chris Bull, *Mom's Fault?*, ADVOCATE, Aug. 24, 1993, at 30. Compare, e.g., Ruth Hubbard, *False Genetic Markers*, N.Y. TIMES, Aug. 2, 1993, at A15 (arguing that genetic studies of homosexuality are flawed and, moreover, will not prevent discrimination against homosexuals) with Chandler Burr, *Genes Vs. Hormones*, N.Y. TIMES, Aug. 2, 1993, at A15 (arguing that the discovery of a genetic link to homosexuality helps to reveal "the true nature of homosexuality" and "force[s] us to look dispassionately at a subject drowning in ignorance"). See generally Natalie Angier, *Study of Sex Orientation Doesn't Neatly Fit Mold*, N.Y. TIMES, July 18, 1993, § 1, at 24 (surveying both sides of the debate over the implications of the genetic-link study for the gay and lesbian communities). For a discussion of a similar debate over the implications of brain studies of gay men, see John Horgan, *Eugenics Revisited*, SCI. AM., June 1993, at 122.

45. See Angier, *supra* note 44, § 1, at 24. See generally RICHARD GREEN, SEXUAL SCIENCE AND THE LAW 63-86 (1992) (discussing twin studies, endocrinological studies, and brain studies of gay men and lesbians and concluding that sexual orientation is immutable).

translate into differences of opportunity, is not likely to persuade judicial decisionmakers who believe that human sexual orientation should only be heterosexual.<sup>46</sup>

Posner utterly fails to qualify his attempts at bioeconomic reasoning. Moreover, he does not even provide a compelling argument for relying on this type of reasoning to guide social policy. Science may be superior to Christian moral theory as a way of accounting for material phenomena; most of us, including myself, "would like to think our appeals to real worlds are more than a desperate lurch away from cynicism [or] an act of faith like any other cult's."<sup>47</sup> But, at least in the industrialized West, the pertinent problem in the late twentieth century involves less religious and other kinds of fundamentalism as barriers to knowledge than it does coming to terms with the partial and increasingly reflexive quality of our knowledge.

## II. Reason upon Reason

Judge Posner's failure to critique his own need to privilege reason, as evidenced by his highly selective rendition of human sociobiology, provides us with a platform to speculate on the nature not of sex but of knowledge production with respect to sex. Sex is hardly a neutral site for questions of economic and political power-sharing. In the end, what is compelling about Posner's use of bioeconomic theory is not the enhanced scientific validity drizzled over the chocolate layer cake of economic theory, but what his "facts" about human sexual behavior tell us about reason. Whatever the accuracies or inaccuracies in his use of sociobiology, whatever biases he may exhibit through his bioeconomic narrative, his bioeconomic theory reveals what drives him as a "scientist." His very decisions to marry a social science to a natural science, to depict that natural science in artificially certain terms, and to assume the posture of the detached observer show that he is unwilling to abandon the modernist desire for "objective" reason and the utopian possibilities it might release, if we only could just get it right.<sup>48</sup>

As I place Posner's stories within a taxonomy of possible late modern or postmodern scientific narratives, I myself am tempted by "the

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46. William Eskridge makes this point repeatedly in his elegant analysis of Posner's treatment of homosexuality, and concludes:

Our main drive must be to transform the social attitudes that ultimately frame the legal analysis. For example, we would have lost *Bowers v. Hardwick* under an Equal Protection challenge, just as we lost it under a Due Process challenge, because what informed the Court's analysis was its conviction that anti-homosexual feelings have persevered without change for millennia.

Eskridge, *supra* note 6, at 385.

Moreover, many in the gay community worry that the announcement of a biological basis for sexual orientation opens the way for a political solution along medical lines, such as abortions of fetuses with a "gay gene" or attempting to find a cure for homosexual behavior. An abortion proposal was already made (although later retracted) by an Orthodox Jewish rabbi. See *Screening for Gays*, JERUSALEM REP., Sept. 23, 1993, at 18.

47. Donna Haraway, *Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective*, 14 FEMINIST STUD. 575, 577 (1988).

48. This despite his claim that his functionalist views are "implicitly antiutopian." POSNER, *supra* note 2, at 30.

siren call of the scientists themselves . . . that scientific practice 'gets at' the world."<sup>49</sup> I think that reason has its place. At the same time, I am deeply amused at and interested in Posner's unreasoned need to assert that reason is *the* place. His deference to the "harder" (more erect?) science of biology belies his insecurity about the claims of the science of economics to its positivist credentials. One has the feeling that if the theory of relativity instead of evolutionary theory could have been the marriage partner, the latter instantly would have become less "sexually desirable."

Judge Posner's views of science are contradictory. On the one hand, he has stated his understanding that:

"[T]ruth" is a problematic concept for a pragmatist. Its essential meaning, after all, is observer independence, which is just what the pragmatist is inclined to deny. . . . The pragmatist's real interest is not in truth at all but in belief justified by social need.

. . . The implication . . . is that scientific theories are a function of human need and desire rather than of the way things are in nature, so that the succession of theories on a given topic need not produce a linear growth in scientific knowledge. Science in the pragmatic view is a social enterprise.<sup>50</sup>

Yet though he confirms elsewhere that science is a social activity, he adheres in *Sex and Reason* to a narrative of science that reinforces the "way things are in nature" perspective. Science documents, catalogues, and rationalizes pre-existing nature.<sup>51</sup> Nature is a given; scientists discover it; the subsequent facts form a basis for rational social policy. His selective use of evolutionary theory shows a compulsive need to authenticate his discipline of economics as this type of "science," much like a nervous outsider who name-drops endlessly in an effort to be accepted at a party.

Why put Judge Posner's faith in science at issue? The point is not to catalogue his intellectual tics, but to understand biological science (and economic science) as a story-telling practice. He believes that by marrying economics to biology, he will drive away constructivist accounts of human sexuality. Biology's relation to social policy is mediated, however, through stories told by Posner and others. Since

49. HARAWAY, *supra* note 1, at 7-8. All current or former scientists can name a moment of epiphany connected to a microscope or analogous tool. For instance, one of mine was when I accurately mapped the genes for wing veins and eye color of the fruit fly, *Drosophila*, in an undergraduate genetics class. The emotions I felt included surprise, power, delight, connectedness.

50. POSNER, *JURISPRUDENCE*, *supra* note 3, at 464.

51. Posner, *supra* note 9, at 530 ("[Hadfield] thinks, not without reason, that I believe that biology, including male sex drive and paternity anxiety, and the high level of child mortality in a society without knowledge of modern medicine and hygiene, goes far to explain the extraordinary subordination of women in many ancient and primitive societies.").

Darwin, myriad narratives of biological science have been implicated in social policy.<sup>52</sup>

This essay is in part a story very different from Posner's, one which can be labelled the temptation of positing science as social construction. Constructivist theories of science and technology attempt to explain scientific knowledge by reversing the usual causal direction of scientific inquiry. By exploring Judge Posner's "facts" not as the cause but as the result of the phenomena of scientific inquiry, a constructivist account emerges: Posner's "facts" about human sexual behavior become the *explanandum* rather than the *explanans*.<sup>53</sup> His bioeconomic narrative tells us about his positioning within knowledge structures, the limits of his chosen discourse, his stance, his biases, his motives—and how they might combine with those of others to produce what to him might be a "representative" view of the world, "persuasive" theories, "truer" knowledge. One significant aspect of his normative reason is that it is the only authentic tool with which to probe social phenomena; reason itself need not be examined. Tellingly also, Posner partially deconstructs sex (through its ostensible opposite, reason) but in doing so, he relies heavily on any number of other unexamined dualisms—primarily nature/culture, but also female/male, passive/active, sex/gender. Richard Posner is positioned squarely within Enlightenment-as-faith.

Social constructivist accounts of biological science in some ways are no different from constructivist accounts of economics, sociology, or law. For example, William Eskridge echoes both Thomas Laqueur and Donna Haraway, who insist that the distinction between sex and gender breaks down under close examination; whatever it is that is viewed as "biological" is inevitably marked by social signs of race, sex, class, and so on.<sup>54</sup> Posner's confidence that there is such a thing as "nature" that can be opposed to "culture," or something that we can

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52. See generally CARL N. DEGLER, *IN SEARCH OF HUMAN NATURE: THE DECLINE AND REVIVAL OF DARWINISM IN AMERICAN SOCIAL THOUGHT* (1991) (recounting the decline of biological explanations for human cultural differences). The historical misuse of biology in the service of social policy makes it important to examine Posner's assertions with respect to their potential for misapplication, regardless of their scientific validity.

53. See Wiebe E. Bijker, *Do Not Despair: There Is Life After Constructivism*, 18 *SCI. TECH. & HUM. VALUES* 113, 119 (1993) (noting that according to some constructivist theories of technology change, "[n]ature [i]s considered not to be the cause of scientific beliefs but the result").

54. Eskridge, *supra* note 6, at 385-86; see HARAWAY, *supra* note 1, at 350 ("[G]ender cannot mean simply the cultural appropriation of biological sexual difference; indeed, sexual difference is itself the more fundamental cultural construction. And even that sense of sexual difference is not enough for feminist theory; gender is woven of asymmetrical and multiply arrayed difference, charged with the currents of power surging through multifaceted dramatic narratives of domination and struggles for its end."); LAQUEUR, *supra* note 35, at 11 ("I want to show on the basis of historical evidence that almost everything one wants to say about sex—however sex is understood—already has in it a claim about gender. Sex . . . is situational; it is explicable only within the context of battles over gender and power."); see also Anne Herrmann, "Passing" Women, *Performing Men*, 30 *MICH. Q. REV.* 60, 63 (1991) ("The relationship between sex and gender in these [transvestite] studies does not suggest that sex evolves into gender, but rather that gender relies on sex for its meaning. Sex itself becomes a gendered category. A 'natural' sex is not established prior to culture . . .").



know about "sex" without implicating "gender," is ruled out in constructivist accounts of biological truth claims. At the same time, it is true that constructivist accounts of biology are fundamentally different from those of the social sciences. Constructivist accounts of the natural sciences must accommodate proportionately more claims that are arguably less subject to the distortion of perspective.<sup>55</sup> But that characteristic does not take away from the central problem of how science is threaded throughout society.

Although Judge Posner recognizes the potentially partial nature of the knowledge uncovered by the bioeconomic analysis of sex,<sup>56</sup> he does not turn his considerable critical power upon his own assumptions. This in and of itself deserves comment. Judge Posner is a believer—if not in god, then in logical positivism. He believes that law should adopt more of the qualities of science, which he describes as "the spirit of inquiry, challenge, fallibilism, open-mindedness, respect for fact, and acceptance of change."<sup>57</sup> Under this view of science, the questing spirit of scientific inquiry not only domesticates the natural world, but also unshrouds the ignorance created by religious dogma and other unexamined traditions.

As even natural and physical scientists themselves now acknowledge, however, such unmitigated enthusiasm for (or, more harshly, glorification of) science fosters unrealistic expectations about the truth claims that scientists make. It sets science up for a fall because, for many reasons, scientific method standing alone cannot achieve the utopian Enlightenment goal of human liberation from unnecessary natural and social burdens.

A reasoned, even a well-reasoned, analysis of sex from an economic viewpoint simply does not rid that analysis of the detritus of social and cultural inequality. Perhaps women's inferior power was attributable in part (until recently and then only in selected developed countries with access to reproductive control technology) to their biological function as childbearers. Should these biological and cultural circumstances, however efficient from a wealth- or gene-maximization perspective, form the primary narrative for future social programs? It is one thing to narrate under this objectivist stance what is apparently a fairly equitable situation for women in Sweden. It is quite another to justify the brutal practice of female genital mutilation in the name of gene-maximization. Before Posner makes the latter sort of claim, he ought to be absolutely certain that it is scientifically justified or that it is carefully qualified. Because of the slippery line between descriptive

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55. See SANDRA HARDING, *THE SCIENCE QUESTION IN FEMINISM* 44-47, 105-06 (1986).

56. See POSNER, *supra* note 2, at 7.

57. POSNER, *JURISPRUDENCE*, *supra* note 3, at 465.

and normative biological "facts," any "fact" of such enormous consequence cannot be flung about as casually as Posner seems to think appropriate.

In addition to the questionable moral consequences of maintaining neutrality towards the phenomena being studied, sociobiologists are affected by their positioning with respect to their subjects. Scientific neutrality is an optical illusion that fools the naive scientist and others. Posner believes that biology and other natural sciences are domains consisting mainly of unassailable "facts" to be contrasted against literature, which is the domain of fiction. But as Donna Haraway points out, this is yet another dualism, one that in the context of science privileges "fact" over the narrative strategies chosen by scientists.<sup>58</sup> Science is a type of storytelling practice, albeit one with highly elaborate and rule-constrained conventions. This is not to deny that there are scientific methods or that Galileo was right. It is to confirm rather that, "objectivity [in science] is about crafting *comparative* knowledge."<sup>59</sup> It is recognizing that science must simultaneously handle stories that account for material phenomena (Mendel's peas; McClintock's corn) and stories that demonstrate bias or misuse in the prevailing accounts of those very same material phenomena. Scientific objectivity cannot mean "dispassionate, disinterested, value-free, point-of-viewless, objective inquiry procedures."<sup>60</sup> Female primatologists, whose studies focused on the behavior of the females rather than the males in any given group, have demonstrated precisely how positioning with respect to the subject makes a large difference in one's facts and, ultimately, one's theories.

This type of objectivity is not the type that Posner wants his biological narrative to perform. He wants "[t]o show that a [human sexual] practice serves a social function . . . [and therefore] that it may be difficult to change."<sup>61</sup> Here lies the rub. As shown in Part I, Posner simply cannot demonstrate conclusively that any of the human sexual practices he analyzes are enslaved via genes to particular social functions. Biological narratives are just as helpless as economic narratives in fending off the constructivist and standpoint critiques of Posner's objectivist science. These other perspectives do not necessarily insist on the complete plasticity of human nature. They are the necessary antidote, however, to the relentlessly functionalist perspective of an objectivist scientist like Posner. They help us to understand the subjects of biology, economics, or any other discipline as richer, more contradictory, more ambiguous, more complex phenomena.

The taxonomy of scientific stories—whether objectivist, constructionist, or from a particular standpoint—applies equally to the legal

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58. See HARAWAY, *supra* note 1, at 4.

59. Haraway, *supra* note 47, at 597 n.5.

60. Sandra Harding, *Feminism, Science, and the Anti-Enlightenment Critiques*, in *FEMINISM/POSTMODERNISM* 83, 87 (Linda J. Nicholson ed., 1990).

61. POSNER, *supra* note 2, at 30.

stories told by Posner and his legal critics.<sup>62</sup> Each of the extant reviews of his book falls within some variation on these categories. Gillian Hadfield's review essay, for example, could be characterized as a feminist empiricist project that contains contradictory strains of objectivist and standpoint perspectives. Martin Zelder's account is straightforwardly objectivist. Robin West's account is insistently and unyieldingly from the standpoint of woman as victim. Eskridge clearly identifies himself as a social constructionist.

I, like other women responding publicly to Judge Posner's book, am skeptical of his stories. But rather than trying to show that he is wrong, I am trying to show that his scientific objectivity is simply bounded, like everyone else's, by his particular standpoint. This standpoint is unbelievably, at times unbearably,<sup>63</sup> unambiguous. Yet his refusal to acknowledge other standpoints, much less the transitions and shadings needed to bridge to them (put another way, his preference for clearly-defined categories, rigid dualisms, "black-letter" sociobiology), cannot withstand the inexorable tendency of reasoned

62. See generally Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990), for a description of various epistemological methods employed by feminist legal thinkers. Cf. Harding, *supra* note 60, at 90-101 (similar taxonomy with respect to feminist scientists).

63. Consider Alice Walker's struggle with writing about clitoridectomy:

To write [*Possessing The Secret of Joy*], I went to Mexico. I needed to be in a Third World country, where I could feel more clearly what it would be like to have a major operation without anesthetics or antiseptics, because that is what happens to little girls when they are genitally mutilated. It shows such contempt for a child's body and such contempt for the clitoris. The actual writing of the book took a year. But it took me twenty-five years since I first heard about female genital mutilation to know how to approach it. To understand what it means to all of us in the world, that you can have this kind of silencing of the pain of millions of women, over maybe six thousand years. . . .

I felt a great deal of rage [while I was writing the book], a very clear burning forceful anger and rage. Because it is just unacceptable that people routinely torture children, betray the trust of children, and cause them to spend their entire lives in shame, embarrassment, and pain. If you can't be angry about the assault on the body of a defenseless child, what can you be angry about? So I felt very angry and yet increasingly clear in myself, because I believe in the power of the word to change things. I was conscious of twenty-five years of thought, growth, and preparation . . . .

ALICE WALKER & PRATIBHA PARMAR, *WARRIOR MARKS: FEMALE GENITAL MUTILATION AND THE SEXUAL BLINDING OF WOMEN* 268-69 (1993).

Contrast this with Posner's glibness and, indeed, deliberately naive cruelty:

What is the mechanism, akin to self-interest at the level of individual decision making, by which efficient laws and customs are generated? This question has puzzled economic analysts of law, but in some cases a Darwinian type of answer is plausible. Take a custom such as clitoridectomy. Suppose in some primitive society the role of the clitoris in female orgasm is noticed, and it is also noticed that women with a highly developed capacity for sexual pleasure are more susceptible to the blandishments of seducers. A polygamist, or for that matter the father of a girl, might tumble to the idea that a wife whose clitoris was removed would require less supervision by her husband.

POSNER, *supra* note 2, at 214.

thought, once put into action, to question its own premises.<sup>64</sup> Perhaps Judge Posner will try to escape this logic by continuing to label as radical feminists all women who critique this book, but that is an inadequate response to a phenomenon that is disconcerting to us all—radical feminist or not—and with which we all must grapple.<sup>65</sup> It is also a violation of one of the fundamental rules of the scientific game that he purports to play—the modernist acknowledgement that truth claims are always revisable in the light of new information.

Social sciences are not the poor cousins of natural sciences; they are more deeply implicated in modernity and in that sense take priority over the natural sciences in constructing social agendas. This is because “the chronic revision of social practices in the light of knowledge about those practices is part of the very tissue of modern institutions.”<sup>66</sup> The reflexivity of knowledge—the continual and inexorable revision of knowledge claims through the alteration of social practices, which in turn changes how and what we know—is a vastly accelerated and vertiginous process in the late twentieth century. The theories of evolutionary biology presume changes that take place over millennia (at least with respect to primates); the theories of economics, by contrast, have much more immediate impact in social practices and therefore can themselves change quickly in response to informational feedback about those social practices. Economics is necessarily a more fluid science than biology, because it is shaped in a much more profoundly interactive way by the social patterns it seeks to explain. Posner seems to grasp this when he puts law and economics at the service of pragmatic legal theory. But his failure to incorporate into his theory the true implications of reflexive knowledge is evident throughout this book. Ironically, Posner has made economics a less

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64. What is interesting, again, are the contradictory statements that Posner makes. In *Sex and Reason*, he seems glued to one particular account of human sexuality; elsewhere he has stated:

Pragmatism in the sense that I find congenial means looking at problems . . . with full awareness of the limitations of human reason, with a sense of the “localness” of human knowledge, the difficulty of translations between cultures, the unattainability of “truth,” the consequent importance of keeping diverse paths of inquiry open, the dependence of inquiry on culture and social institutions, and above all the insistence that social thought and action be evaluated as instruments to valued human goals rather than as ends in themselves.

POSNER, JURISPRUDENCE, *supra* note 3, at 465. Assuming that this is not empty rhetoric, there is some basis for believing that Posner may one day understand the limitations of his objectivist bioeconomic narrative.

65. His attack on Gillian Hadfield is particularly strange because, of all of the reviewers that he rebuts, she agrees with him at least in his conviction that empiricist economics is a useful tool for probing social phenomena. That is, she shares with him a particular storytelling method. Her main critique of his book focuses on failures in his logic—what she calls endogeneity or circularity in reasoning. This type of critique obviously accepts the importance of logic as a scientific tool. Compare Gillian K. Hadfield, *Not the “Radical” Feminist Critique of Sex and Reason*, 25 CONN. L. REV. 533, 542-43 (1993) with Posner, *supra* note 9, at 527-31 (responding to Hadfield’s critique).

Feminist legal scholars have identified differential access to wage labor as a fundamental problem in structuring power relations between men and women. See, e.g., Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 822-36 (1989). Posner’s refusal to engage feminist scholars on a ground that is of common concern to both is problematic.

66. ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* 40 (1990).

supple and responsive social theory by marrying it to biology.<sup>67</sup> Why did he choose to do this? Perhaps he believes that if positivism explains, absolute positivism explains absolutely.

Or, Posner may fall into the trap of equating bioeconomics with greater certitude than economics standing alone because he, like many intellectuals in the late twentieth century, is caught in an unsettling dilemma. Reason turned upon itself—reflection upon the nature of reflection—means that all of our truth claims shift perceptibly and quickly, more perceptibly and quickly than perhaps any of us might want. While Posner has accepted intellectually that reflexivity subverts the absoluteness of reason,<sup>68</sup> he is nonetheless glued irrationally to the hierarchy of knowledge claims. He performs the obligatory pragmatic, even postmodern, caveats by acknowledging no “final truths”<sup>69</sup> and by stating his subjective preferences in favor of a particular brand of market economics,<sup>70</sup> but essentially he is an Enlightenment ethicist who is embarrassed to admit to the nostalgic normative assumptions embedded within his own claims.<sup>71</sup>

Legal writers, whatever their positions or preferred methods, resist the uncomfortable application of reflexive critical thought to their preferred theories and are generally unwilling to grasp the implications and limitations of their particular perspectives.<sup>72</sup> Even within the realm of economic theory, for example, Posner has demonstrated antipathy toward the twenty-seven other flavors of law and economics that might serve as equally adequate tools for constructing knowledge and suggesting normative programs.<sup>73</sup> He fortifies that impulse here in the realm of his bionic bioeconomic theory. In doing so, however, he is ducking perhaps the most central questions of his time: How do we, scientists and non-scientists alike, cope with the limits of reason? How can we temper reason with other forms of knowledge, with other ways of apprehending the world, so as to improve our lot?

67. It should be noted, as a further irony, that economists Richard Nelson and Sidney Winter have also adopted evolutionary theory in the hopes that it would make the economic theory of business organization more dynamic and less inflexible. See DEGLER, *supra* note 52, at 314.

68. See Posner, *Pragmatism*, *supra* note 3, at 31, 35.

69. *Id.* at 35.

70. See POSNER, *supra* note 2, at 29-30.

71. See Pierre Schlag, “*Le Hors de Texte, C’est Moi: The Politics of Form and the Domestication of Deconstruction*,” 11 CARDOZO L. REV. 1631, 1651-53 (1990).

72. *Id.*; see Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 886-91 (1991) (discussing the failure of law-and-economics disciples, neo-pragmatists, and CLS proponents alike to examine their own foundational beliefs); see also Bartlett, *supra* note 62, at 847-49 (describing the same phenomenon in feminist jurisprudence); Martha Minnow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47, 49-53 (1988) (same).

73. Other law-and-economics theorists question the privileging of efficiency over other criteria. See ROBIN P. MALLOY, *PLANNING FOR SERFDOM: LEGAL ECONOMIC DISCOURSE AND DOWNTOWN DEVELOPMENT* 16-29 (1991).

### Conclusion

One of the deeply embedded dualisms that structure our current stories of human sexual behavior is that of male voracity/female indifference. It is tempting to link this to another dualism: the monomaniacal application by some scientists of logical positivist methods to untamed and uncatalogued nature. As Camille Paglia put it: "Man's genital visibility is a source of his scientific desire for external testing, validation, proof. By this method he hopes to solve the ultimate mystery story, his chthonian birth."<sup>74</sup> Posner's denial of the mystery of sex ultimately forms a signpost to its irreducible mystery—perhaps even unknowability. Sex stories authored by Posner can tell us as much about reason as reason can tell us about sex.

At the same time, we should not dismiss scientific accounts out of hand. They do have power to convince. The question is what kind of stories they tell, and whether any of these stories should form the basis of just social policy. Justice has been blindfolded, indicating that she herself may not privilege reason, structure, and analytical order. Who knows what she weighs in her scales and what sorts of claims are ultimately heavier than others?

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74. CAMILLE PAGLIA, *Sex and Violence, or Nature and Art*, in *SEXUAL PERSONAE: ART AND DECADENCE FROM NEFERITTI TO EMILY DICKINSON* 22 (1990).